torneys, notice must be given in the manner provided for by section 1005 of the Code of Civil Procedure. As to whether the giving of this notice is necessary to confer jurisdiction to make the order of substitution, the court in the Gill case ventures no opinion.[4]

Since under the holding of the court, Mr. Tormey had never become the attorney of record in the action, the order of dismissal was vacated. This decision proceeds upon the ground that the stipulation in this case amounted to an attempt by the client to control the course of the action in court, and though doubtless declaring the California rule,[5] is against the weight of authority in other jurisdictions.

It is a universal rule that a party may appear either by attorney or in person, but cannot do both; and if by attorney, then all matters pertaining to the conduct of the suit in court are under the exclusive control of the attorney. Hence a stipulation by a client extending the time for appearance is void.[6] The subject matter of the litigation, on the other hand, is according to the great weight of authority, under the exclusive control of the client to the extent of his interest therein.[7] A stipulation by the client for dismissal is one pertaining to the subject matter of the action, and not to the conduct of the case in court, and hence such a stipulation is, in the majority of jurisdictions, held to be valid.[8]

J. D. R.

COMMUNITY PROPERTY: RENTS, ISSUES AND PROFITS OF SEPARATE ESTATE.—Under the system of community of acquests and gains as it exists in the Spanish law, the community consists of all property acquired by "onerous" title during the continuance of the marriage, i. e., property acquired for a valuable consideration, while all property acquired by "lucrative" title, i. e., by gift, bequest, devise or descent, becomes the separate estate of the spouses.[1] A number of the states of this country which have been subjected to the influence of Spanish jurisprudence have adopted the community system with certain modifications, among which is the statutory declaration that the "rents, issues and profits" arising from the separate estate of the spouses shall be separate property.[2] Several of the states, however, have adopted the Spanish law with-

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[3] (1897), 118 Cal. 589, 50 Pac. 670.

[4] See Schultheis v. Nash (1909), 27 Wash. 250, 67 Pac. 707.

[5] Toy v. Haskell (1900), 128 Cal. 558, 60 Pac. 89; Boca etc. R. R. Co. v. Superior Court (1907), 150 Cal. 153.

[6] Wylie v. Sierra Gold Co. (1898), 120 Cal. 485, 58 Pac. 809; Mott v. Foster (1872), 45 Cal. 72.

[7] Cameron v. Boeger (Ill., 1902), 93 Am. St. Rep. 165, 170 n.

[8] Paulson v. Lyson (1903), 12 N. Dak. 354, 1 Ann. Cas. 245.

[1] Note to Cooke v. Bremod (Tex., 1864), 86 Am. Dec. 626, 629 n; The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California, 1 California Law Review, 33.

[2] Cal. Civ. Code, §§ 162, 163; Note to Re Pepper (Cal., 1910), 31 L. R. A. (N. S.) 1092 n.

out this change.[3] In this connection the question arises what property is included within the phase "rents, issues and profits" of the separate estate.

In the case of *In re Buchanan's Estate*,[4] the Washington Supreme Court was called upon to determine the character of an interest in a corporation. The original investment had been made from the separate estate of the spouses, and largely through the personal efforts of the husband, who became an officer of the company, the original investment had, at the time of the death of the wife, increased in value twenty fold. The court held that the increase of the capital invested belonged to the community, because it had been produced largely through the personal afforts of the husband during the existence of the marriage. According to the view thus taken, where separate personalty is increased in value through its active employment by the spouse, the character of such increase will depend upon the relative contributing force of the original investment and the personal efforts of the husband or wife. This is a re-statement of the doctrine of Lake v. Lake[5] which is commented upon and criticized by Professor Pomeroy writing in the West Coast Reporter.[6] The court also held that the entire interest in the corporation was community property because the original capital invested had become so confused with the community property that its identity had been lost.

It is of the essence of the community system that property acquired as a result of the personal efforts or skill of the spouses or either of them shall form part of the community. In those jurisdictions where the "rents, issues and profits" of the separate estate are declared to be separate property, when the labor or skill of the spouses is applied to the separate estate of either, what should determine the character of the increase thereby produced? In solving this problem, the courts have drawn a distinction between the increase arising from realty, and that arising from personalty. Thus it is uniformly held that the products arising from separate realty, form part of the separate property of the spouse, even though the labor or skill of the spouses has contributed to produce the increase.[7] Such a rule, it is argued, is re-

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[3] In Louisiana the rents, issues and profits of the wife's separate property which she administers are separate property. But if the husband manages the property, the increase is community property. Note to Re Pepper (Cal., 1910), 31 L. R. A. (N. S.) 1092, 1094 n. In Texas, the rents, issues and profits of the separate estate form part of the community. Id. 1096 n. In Idaho, though such increase of the separate estate forms part of the community, the increase of the wife's estate is protected from execution by a judgment creditor of the husband. Id. 1094 n.

[4] (Wash., Jan. 10, 1916), 154 Pac. 129.

[5] (1884), 18 Nev. 361, 392, 4 Pac. 711, 718.

[6] 4 West Coast Rep. 193.

[7] Lewis v. Johns (1864), 24 Cal. 98, 85 Am. Dec. 49 n; Estate of Pepper (1910), 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092 n.

quired because of the impossibility of apportioning the crop, and because of the fact that the land is the principal producing agency. In the case of separate personalty employed by the spouse in carrying on a business, on the other hand, two different rules have been declared for determining the character of the increase. (1) Under the rule of the principal case, the increase thus produced will not be apportioned between the community and the separate estate, but will be held to belong to the community if it was produced mainly through the labor of the spouse, but if it arose mainly from the employment of the property as capital, then it will be separate property. (2) A more logical rule seems to be contended for by Professor Pomeroy[8] that where one spouse employs his separate estate in carrying on a business, trade or profession during the continuance of the marriage, that part of the increase should be held to be separate estate which would represent the return of a like amount of capital if invested at a fair, average rate of interest during the entire period of the marriage, while the residue should be held to be community property. In the case of Pereira v. Pereira[9] the California Supreme Court adopts this rule with this modification: that it is competent for the contestant to show the actual earning power of the capital invested in the business, but that if the business has been prosperous, it will be presumed, in the absence of proof, that the earning power of the capital employed will at least equal the usual rate of interest on a long term investment which is well secured.

J. D. R.

CONSTITUTIONAL LAW: IMPRISONMENT FOR DEBT.—In interpreting the almost universal clause in state constitutions abolishing imprisonment for debt, the courts are practically unanimous in holding that such provisions do away with arrest as an accessory to the collection of contract obligations, but leave it unabated as an aid to actions *ex delicto*. All of these interpretations are based on one or both of the following arguments: first, that the words of constitutions are the words of the people, that they must be given their sense in common parlance stripped of legal subtleties, and that when the man in the street says "debt," he means contract debt; second, that there is a semi-criminal and punitive element in tort actions which justifies imprisonment as a vindication of the law upon which the action is based.[1]

When the question arose in *Bronson v. Syverson*,[2] the Wash-

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[8] 4 West Coast Rep. 193.

[9] (1909), 156 Cal. 1, 103 Pac. 488, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880.

[1] Bolden v. Jensen (1895), 69 Fed. 745; United States v. Walsh (1867), 1 Abb. U. S. 66, 1 Deady, 281, Fed. Cas. No. 16,635, is the leading case on the generally accepted view. See also an exhaustive note on the whole subject in 34 L. R. A. 634.

[2] (Wash., Nov. 22, 1915), 152 Pac. 1039.